SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

No. 71-1286

TYLER INDEPENDENT SCHOOL DISTRICT, ET AL.,
Petitioners,

versus

HONORABLE WILLIAM WAYNE JUSTICE, UNITED STATES JUDGE FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CIVIL APPEALS FOR THE FIFTH CIRCUIT AND PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Come now CURTIS DUNN, Next Friend of ROBERT DUNN and RONALD DUNN, Minors; LOYCE E. ALLEN, Next Friend of REGINALD D. ALLEN, A Minor; For themselves and all others similarly situated, as Respondents, and pray that the Court refuse to issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit,

rendered on January 12, 1972, in the above styled cause, and refuse to issue a Writ of Mandamus and/or Prohibition.

As grounds for refusing to grant a Writ of Certiorari and for refusing to grant a Writ of Mandamus and/or Prohibition in this cause, the Respondents would show the Court as follows:

THE OPINION BELOW

The United States Court of Appeals for the Fifth Circuit denied the Petitioners' Petition for a Writ of Mandamus and/or Prohibition. This Opinion was not reported.

JURISDICTION OF THE COURT

The jurisdiction of this Court is invoked under the provisions of 28 USC 1254 (1) and 28 USC 1651 (2).

THE QUESTIONS PRESENTED FOR REVIEW

The Respondents state that there are no questions presented for review to the Supreme Court. Respondents state that the District Court was correct in appointing the bi-racial committee and giving the committee the powers stated in the District Court's Order.

STATEMENT OF THE CASE

A. The Trial Court Proceedings:

Respondents adopt the first two paragraphs of the Petitioners' Statement of the Case under trial court proceedings, but state that Paragraph III is not en-

tirely correct. The December 7 Order which is shown in Appendix D, Page D-1 of the Petitioners' Brief provided that the bi-racial committee shall be an agent of the Court and the advice and recommendation of such bi-racial committee shall serve as a basis for final action by the board or by the Court relating to matters in the above styled suit. The Order provided that the meetings, discussions and deliberations of the committee shall be conducted in executive session. However, the Court did state that the committee shall adopt its own rules of procedure to govern its meetings, and this was not specified in this and prior orders. The by-laws shall be filed with the Court and with the Board of Education. The Order further provided that the committee was authorized to hold hearings and to conduct public meetings from time to time as they deem necessary. The Respondents would take this to mean that the committee was authorized to hear evidence or testimony submitted to the committee, to allow cross examination of the witnesses by the committee and also for witnesses to present testimony on their behalf. The other portions of Part A of Petitioners' Brief are correct.

B. Facts Pertinent to the Issues Presented:

(1) Respondents disagree with Petitioners that there are no exceptional conditions existing in the above numbered cause which warranted a reference to a master in chancery. The Court did not mention a master in chancery, but only appointed the committee both as an advisory body to the Board of Education and the administration of the Tyler Independent

School District, and also charged it with the responsibility of acting as an agent to the District Court to advise and make recommendations to the Court in the transition of the district to a unitary status.

There has been conflict at both senior high schools in Tyler since the integration order was signed by the District Court. To begin, Emmett Scott, the all black high school, was closed by Court Order. Part of the black students were sent to John Tyler High School and the remaining black students were sent to Robert E. Lee High School. The first sign of real trouble occurred when some 250 to 300 black students walked out after a cheerleader election which was held at John Tyler High School. A suit was filed in the United States District Court for the Eastern District of Texas, Tyler Division, after the School Board refused to discuss the matter with a group of parents. The United States District Court for the Eastern District of Texas, Tyler Division, issued a Temporary Restraining Order and later, a Preliminary Injunction, which prohibited the school officials from taking disciplinary action against the students who walked out, and ordered the immediate readmission of the black students. This controversy arose after the school officials presented a ballot which contained the words "Black" over a list of black students, and the word "White" over a list of white students. This was challenged by a group of black students. However, the election was held and the students protested by having a sit-in around the flag pole. It was after this incident that occurred at John Tyler High School that the Justice Department, through one of its attorneys, Joe Rich, filed a Motion with the Dis-

trict Court to appoint a bi-racial committee for the Tyler Independent School District.

The Honorable William Wayne Justice, United States Judge for the Eastern District of Texas, Tyler Division, ordered the Plaintiffs in the John Tyler cheerleader case to submit nominations for the bi-racial committee and also ordered the School Board to submit nominations. There was some discussion among the parties as to how many blacks and how many whites would be nominated. This was clarified by an Order of the Court, whereby the Court ordered each side to nominate eight (8) whites and eight (8) black nominees. There was no opposition as to the structure of the committee by the School Board. However, the School Board did oppose the appointment of this bi-racial committee and each member of the School Board filed an affidavit stating his opposition to the appointment of such a committee.

Later, another controversy arose at Robert E. Lee High School over the use of Confederate symbols and symbolism at the high school. A group of black students protested the use of the Confederate flag, the singing of "Dixie", the use of the word "Rebel" as a team name, and the use of the drill name, the "Rebelettes", and for use of other Confederate symbols. The School Board refused to act on this matter. However, the School Board did appoint three committees to study the symbolism issue. A student, parent and faculty bi-racial committee studied the matter and all three committees voted to abolish the use of the Confederate flag as a school flag, the use of a Confederate

cannon, the use of "Dixie" as a school fight song, the school colors of red and white, and the Rebel mascot. However, when this was referred to the School Board, the issue was tabled.

Later, a group of black students petitioned the Commissioner of Education of the State of Texas and asked the Commissioner to withdraw certain funds from the school district if these symbolisms were not abolished. After a study by the Texas Education Agency and a recommendation by the agency to abolish the symbolisms, the School Board voted to abolish the symbolisms. This occurred after the violence erupted on the campus between the white and black students. The incident was investigated by the Grand Jury and the Grand Jury referred to the incident as a "riot". However, the police were called to the campus and there were numerous fights among black and white students. The Grand Jury blamed the trouble on black militants, but there were white as well as black students involved in the fracas.

With these factors in mind, certainly it cannot be said that there are no exceptional conditions existing in the Tyler Independent School District which would make it unnecessary to appoint a bi-racial committee.

(2) It is true that the District Court's Order did not provide that the School Board would be allowed to hear testimony, to cross examine witnesses and to present their evidence as to any issue before the bi-racial committee. The bi-racial committee was appointed by the Court to investigate matters before they

reached the School Board level. The bi-racial committee was also appointed to act as an agent for the Court to advise and make recommendations to the Court in assisting the transition of the district to a unitary status. If the Court allowed the School Board to intervene, this would destroy the purpose of the bi-racial committee.

(3) It is true that there were specific areas that the committee was ordered to review. The committee was ordered to carefully review (1) faculty and staff, (2) transportation of students, (3) extracurricular activities, (4) school facilities, and (5) student assignments. The Court said that other areas may appear relevant from time to time or may be referred to the committee by the Court or by the Board of Education.

(4) The bi-racial committee was made up of persons appointed by both the black community and the School Board. What the School Board means by disinterested persons is unclear, but none of the plaintiffs in the *Dunn* case were appointed to the committee and the nominations were made by a group of black people. Thirty-two (32) names were submitted to the Court when the Court made the final decision as to whom would serve on the committee. Certainly, this is a fair method for selection of a bi-racial committee. In some instances, in other states, bi-racial committees were appointed by the Court without nominations.

(5) A hearing was held in the District Court for the Eastern District of Texas, Tyler Division, concerning the appointment of a bi-racial committee. This

hearing was held in conjunction with the *Dunn* case. Testimony was offered by the Government, and testimony was offered by the School Board. The School Board presented opposition to the appointment of the bi-racial committee and was given every opportunity to present witnesses concerning this matter. There was no hearing held on the Supplemental Order which was issued by the Court on December 17, 1971, but this Order was only issued to clarify some of the questions that had been asked by the bi-racial committee.

C. Decision of the Court of Appeals:

The Court of Appeals on January 12, 1972, entered a Memorandum Order which denied the Petitioners' Application for a Writ of Mandamus and/or Prohibition.

REASONS FOR REFUSING TO GRANT WRIT

The Petitioners are incorrect in their presumption that the Court was appointing a bi-racial committee to serve as a master in chancery under the provisions of Rule 53, Federal Rules of Civil Procedure. The advisability of establishing bi-racial committees has been clearly stated by the Fifth Circuit Court of Appeals. It has also been approved by other Circuit Courts. The cases approving bi-racial committees are: *Ellis v. Board of Public Instruction of Orange County*, 423 F. 2d 203 (5th Cir. 1970); *United States v. Hinds County School Board*, 417 F. 2d 852 (5th Cir. 1970); *Singleton v. Jackson Municipal School District*, 426 F. 2d 1364 (5th Cir. 1970); *Hightower v. West*, 430 F. 2d 552 (5th

Cir. 1970); *Davis and United States v. Mobile County*, 432 F. 2d 833 (5th Cir. 1970). All these cases contain quotes explaining why the bi-racial committees are important. These cases state that communication between the races is difficult and the cases point out that there are other difficulties to be encountered in changing a formerly segregated school district to a unitary school system. These committees were charged with the responsibility of investigating, consulting and advising with the School Board periodically with respect to all matters tending to promote desegregation.

Certainly, with the attitude of the School Board, which has been brought out in the *Dunn* case, and the attitude of the School Board in handling the first recommendation of the bi-racial committee which was to add an additional cheerleader to the cheerleaders at John Tyler High School, there is much need and much work ahead for a bi-racial committee in the City of Tyler. Petitioners state that there are no exceptional circumstances existing in the above numbered cases. However, the statement is characteristic of the propensity of the School Board to brush aside events that necessitate action by the Court in the first place, including the cheerleader incident and the trouble at Robert E. Lee High School.

Respondents cannot see the reasoning of Petitioners in stating that they should have the right to hear testimony, to cross examine witnesses and to present their evidence to any issue before the bi-racial committee. In the Order issued by the District Court on

December 17, 1972, the Court ordered the School Board to designate not less than one nor more than three persons of the School Board or members of the administrative staff of the Tyler Independent School District to act as a liaison between the bi-racial committee and the Board of Education and to attend the meetings of the bi-racial committee when requested to do so by the committee. To allow the School Board to present testimony at any committee meeting and to cross examine witnesses would turn the bi-racial committee meetings into a quasi-legal proceeding. As stated by the Court, it is not the purpose of the committee to supercede the Board, but to give its advice and recommendations reached objectively in a non-partisan manner which would serve as the basis for final action by the Board or by the Court in matters relating to desegregation process. There are no powers given to the bi-racial committee to approve bond issues, to approve new buildings for the school system, to approve or disapprove the hiring or firing of teachers, or to interfere in any way with the normal orderly process of running a school system. The bi-racial committee was appointed to look into desegregation matters and into matters which would promote the orderly process of converting Tyler Independent School District into a unitary system.

The Petitioners are erroneous in stating that the Court did not set out specific areas for examination. There is no way that the Court could anticipate every problem that might arise. The Court did set out five areas which have been stated above for the bi-racial committee to examine. To narrow the scope of the bi-

racial committee would be to destroy the purpose of the bi-racial committee.

The bi-racial committee was not appointed to serve as a master in chancery, but was appointed by the Court to act as an investigative arm of the Court and to assist the Court in making decisions concerning the conversion of the school system into a unitary system.

The bi-racial committee also is to serve as an advisory body to the Board of Education and administration of the Tyler Independent School District. It is also charged with the responsibility of acting as an agent of the Court to advise and make recommendations to the Court in the transition of the district to a unitary status. The bi-racial committee's report does not have the effect of a master's report and the Petitioners are erroneous in this assumption.

How the Petitioners can say that this Order was issued without notice to them seems somewhat ridiculous. A complete hearing was held before the District Court and both parties were allowed to present evidence in support and in opposition of the bi-racial committee. The School Board had every opportunity to appeal the Order of the District Court in appointing the original bi-racial committee. However, it was not until later that the Court issued a Supplemental Order that the School Board decided to appeal the Order of the Court appointing the bi-racial committee.

Considering the conflict, opposition to integration of the school system, the violence at Robert E. Lee High

School, and the violence at John Tyler High School following the cheerleader election, certainly it is not unreasonable for the District Court to require the bi-racial committee to meet in executive session and not hold open meetings. This does not say that the bi-racial committee cannot call witnesses. Also, the Order does provide that the bi-racial committee is also authorized to hold hearings and conduct public meetings from time to time as the committee deems necessary.

The School Board raised the question that every action taken by the School Board will be scrutinized by the bi-racial committee. However, it is very clear from the Court's Order that the bi-racial committee is to advise the Court and make recommendations to the Court only in the areas set forth by the Court and only in matters concerning desegregation of the school system and only in the transition of the district to a unitary status.

CONCLUSION

It is clear from the prior actions of the Tyler Independent School District Board of Trustees that the school system will fight every effort of the United States District Court for the Eastern District of Texas, Tyler Division, to change the district to a unitary status. First, it was necessary to order the Tyler Independent School District to desegregate its classes. Second, the Tyler Independent School District has appealed every action of the United States District Court except the desegregation order. Third, it is clear from a study of the affidavits filed by the members of the

Tyler Independent School District Board of Trustees that each member opposes a bi-racial committee. Lastly, it is clear that the Board of Trustees will oppose any effort by the District Court to promote a unitary school system. This is evident from the fact that the Board will not follow recommendations of its own committees that recommended the Confederate symbols be abolished.

It would be a blow to the efforts of all parties who have tried to change the Tyler Independent School District to a unitary system for the Court to issue a Writ of Certiorari or in the alternative to grant an Application for a Writ of Mandamus and/or Prohibition. If this were done, the efforts of all parties to desegregate the Tyler Independent School District would be set back fifty years.

The Respondents pray that the Supreme Court refuse to grant the Petition for Writ of Certiorari and deny the Application for Writ of Mandamus and/or Prohibition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Brief for Respondent in opposition to Petitioners' Petition for Certiorari and Petition for Writ of Mandamus and/or Prohibition was delivered by United States mail, postage prepaid, properly addressed, to Mr. Marshall Spivey, 1101 Peoples Bank Building, Tyler, Texas, 75701, attorney for Petitioners, on this____ day of May, 1972.

_____

KEN T. MILLER

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In the Supreme Court of the United States

OCTOBER TERM, 1971

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HONORABLE WILLIAM WAYNE JUSTICE, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND ALTERNATIVE PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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